

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEAN FITZPATRICK : CIVIL ACTION
:
:
v. :
:
:
MICHAEL QUEEN, et al. : NO. 03-4318

MEMORANDUM

Padova, J.

May 16, 2005

Smithfield Foods, Inc., Joseph W. Luter IV, and Michael H. Cole have filed a Motion to Dismiss the Amended Cross-Claim of Pennexx Foods, Inc., pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court heard oral argument on the Motion on February 4, 2005, and the matter has been fully briefed by the parties. For the reasons that follow, the Motion is granted in its entirety.

I. BACKGROUND

In June 2001, Pennexx Foods, Inc. ("Pennexx")¹ which, at the time was known as Pinnacle Foods, Inc., and Smithfield Foods, Inc. ("Smithfield")² entered into a Stock Purchase Agreement. (Am. Cross-Cl. ¶ 49; Pennexx Resp. Ex. A.) Pursuant to the Stock Purchase Agreement, Smithfield purchased 50% of the outstanding

¹ Pennexx is a Pennsylvania corporation that, at all times material to this action, was in the business of processing, packaging, and delivering case-ready meat to retail supermarkets in the northeast United States. (Am. Cross-Cl. ¶ 1.)

² Smithfield is a Virginia corporation that produces, processes, and markets a variety of fresh pork and processed meat products, with operations in the United States and throughout the world. (Id. ¶ 2.)

shares of Pennexx stock for a discounted price of \$6 million and nominated two of its executives, Joseph W. Luter, IV, and Michael H. Cole, to the Pennexx Board of Directors. (Am. Cross-Cl. ¶¶ 49, 52.) The parties also entered into a Credit Agreement, pursuant to which Smithfield agreed to provide Pennexx with a revolving line of credit not to exceed \$30 million. (Id. ¶ 50; Pennexx Resp. Ex. A.) In exchange, Pennexx granted Smithfield a blanket lien and security interest in all of Pennexx's real and personal property. (Am. Cross-Cl. ¶ 226.)

Pennexx's financial performance subsequently declined and the company began to seek waivers of default on its obligations under the Credit Agreement. (Am. Cross-Cl. ¶¶ 181, 185, 225.) Smithfield waived Pennexx's potential defaults on several occasions. (Id.) On May 8, 2003, however, Smithfield notified Pennexx that it was in default under several provisions of the Credit Agreement and declared immediately due and payable all outstanding amounts under the Credit Agreement. (Id. ¶¶ 281, 283.) On May 19, 2003, Smithfield commenced a replevin action against Pennexx in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 03-3155. (Id. ¶ 297.) The case was assigned to Judge Charles R. Weiner. On May 22, 2003, following an emergency hearing, Judge Weiner entered an order directing the Clerk of Court to issue a Writ of Seizure for all tangible property located at Pennexx's Tabor Facility. (Id. ¶

305.) On May 29, 2003, Pennexx and Smithfield entered into a Forbearance Agreement, whereby Pennexx agreed to pay off its outstanding loan obligations and related expenses, totaling approximately \$13 million, by June 9, 2003 at 3:00 PM. (Id. ¶ 318; Forbearance Agreement ¶ 3.) Pennexx also agreed to provide Smithfield with an absolute and irrevocable release and discharge of Smithfield's \$12.1 million guaranty of Pennexx's obligations under its equipment lease with Commerce Commercial Leasing, and to provide Smithfield with immediate peaceful possession of all collateral under the Credit Agreement if Pennexx failed to timely pay the full amount due. (Am. Cross-Cl. ¶ 318; Forbearance Agreement ¶¶ 4, 5.) Pennexx further agreed to the following general release:

10. **General Release of Smithfield.** Except for Smithfield's obligations under this Agreement, PENNEXX, individually and on behalf of its stockholders and affiliates in their respective capacities as such, hereby irrevocably and absolutely releases, remises, acquits, and discharges Smithfield and each of its current and former officers, directors, employees, shareholders, affiliates, subsidiaries, parent corporations, attorneys, agents, affiliates, predecessors, successors and assigns, from and of any and all claims, causes of action, actions, liabilities, damages, losses, expenses, costs and demands, of any kind or nature whatsoever, absolute or contingent, matured or unmatured, liquidated or unliquidated, now known or subsequently discovered, arising prior to the date hereof or in any way relating to actions, omissions or events occurring or failing to occur prior to the date hereof, specifically including without limitation (i) all claims and causes

of action, if any, arising out of or in any way relating to the Loan Documents, the Leases, the Guaranty, this Agreement, or any course of conduct, course of dealing, statements (oral or written) or actions of Smithfield in interest in connection with the Loan Documents, the Leases, the Guaranty, or this Agreement, (ii) all claims or causes of actions [sic] that were or could have been asserted in the Replevin Action, and (iii) all claims and causes of action asserted in the brief filed by PENNEXX in the Replevin Action on May 27, 2003. PENNEXX further hereby irrevocably and absolutely releases, remises, acquits and discharges any and all third parties that are liable (in tort, contract or otherwise) with Smithfield to PENNEXX on or with respect to any of the claims, causes of action, actions, liabilities, damages, losses, expenses, costs or demands released in the preceding sentence of this Paragraph 10.

(Am. Cross-Cl. ¶ 318; Forbearance Agreement ¶ 10.) In exchange for Pennexx's consideration, Smithfield agreed to forbear from exercising any of its rights or remedies until June 18, 2003, provided that Pennexx complied with its obligations under the Forbearance Agreement. (Am. Cross-Cl. ¶ 321; Forbearance Agreement ¶ 2.) Smithfield also agreed to vote all of its shares of Pennexx common stock in favor of, or to execute a written consent to the adoption and approval of, a proposal to both merge Pennexx with and into a to-be-formed, wholly-owned Delaware subsidiary of Pennexx and increase the number of authorized shares of Pennexx capital stock. (Forbearance Agreement ¶ 13.) Smithfield further agreed not to sell or transfer any of its shares of Pennexx common stock for a period of at least 120 days and to refrain from taking any

action to prevent or make more difficult the passage of the merger and share increase proposal. (Id.)

On May 30, 2003, Judge Weiner entered a Stipulated Order approving the Forbearance Agreement "as a reasonable resolution of all matters" and entering the Forbearance Agreement as "an Order of the Court [that] shall be fully enforceable by this Court as a Consent Decree." (Smithfield Defs.' Ex. 1.) The Stipulated Order further provided that "[t]he Court retains jurisdiction over this matter to enforce this Stipulated Order in accordance with the terms of the [Forbearance] Agreement." (Id.) After Pennexx failed to timely pay the amount due under the Forbearance Agreement, Smithfield took control of Pennexx's assets and operations. (Am. Cross-Cl. ¶ 336.)

On July 24, 2003, the Winer Family Trust³ commenced the instant securities action against Pennexx, Smithfield, Luter, Cole, and other present and former officers and directors of Pennexx. On December 5, 2003, Pennexx filed a Cross-Claim against Smithfield, Luter, and Cole (collectively, "the Smithfield Defendants"). On December 12, 2003, the Smithfield Defendants filed a "Motion to Sever and Transfer the Cross-Claim to Civil Action No. 03-3155." The Smithfield Defendants also filed a "Motion to Enforce Court's Stipulated Order" in Civil Action No. 03-3155 on the same date. On

³ On February 11, 2005, the Winer Family Trust withdrew as Lead Plaintiff and the Court granted Sean Fitzpatrick's Motion to Intervene as Lead Plaintiff.

January 22, 2004, this Court denied the Smithfield Defendants' Motion to Sever and Transfer the Cross-Claim without prejudice.⁴

On February 4, 2004, Pennexx filed an Amended Cross-Claim against the Smithfield Defendants. The essence of the Amended Cross-Claim is that the Smithfield Defendants devised and implemented a strategy to takeover Pennexx and ultimately eliminate the company as a going concern. The Amended Cross-Claim asserts the following fourteen counts: Contribution (Count I); Fraud in the Inducement: The Smithfield-Pennexx Joint Venture (Count II); Fraud in the Inducement: The Forbearance Agreement (Count III); Fraud on the Court (Count IV); Breach of Fiduciary Duty: Luter and Cole

⁴ In denying the Motion, this Court stated as follows:

At the present time, this Court is not satisfied that the severance and transfer of Pennexx's Cross-Claim to Judge Weiner for consolidation with Civil Action No. 03-3155 is appropriate, in view of the fact that the Cross-Claim includes counts against defendants who are not parties to that action. In the event that any issues are determined by Judge Weiner in Civil Action No. 03-3155 that would qualify for issue preclusion in the instant action, any party may assert any claims of issue preclusion before this Court. In sum, this Court believes that, at the present time, institutional conservation in the instant action can be more appropriately achieved by way of the doctrine of issue preclusion, if applicable, rather than through the severance and transfer of Pennexx's Cross-Claim to Judge Weiner for consolidation with Civil Action No. 03-3155. Accordingly, the instant Motion is denied without prejudice to any party to assert any claim of issue preclusion, or to renew the instant Motion, at a later juncture.

(01/22/04 Order.)

(Count V); Breach of Fiduciary Duty: Smithfield (Count VI); Tortious Interference with Existing Contractual Relations (Count VII); Tortious Interference with Prospective Contractual Relations (Count VIII); Breach of Contract: The Credit Agreement (Count IX); Breach of Contract: The Forbearance Agreement (Count X); Breach of Good Faith and Fair Dealing (Count XI); Negligent Misrepresentation (Count XII); Breach of Good Faith and Fair Dealing (Count XIII);⁵ and Negligence (XIV).⁶ The Amended Cross-Claim seeks \$226 million in damages and vacatur of the May 30, 2003 Stipulated Order entered in Civil Action No. 03-3155.

On August 17, 2004, the Clerk of Court reassigned Civil Action No. 03-3155 to Judge Lawrence F. Stengel. On October 15, 2004, the Smithfield Defendants filed the instant Motion to Dismiss. On October 22, 2004, after holding a telephone conference with counsel for Pennexx and Smithfield, Judge Stengel entered an Order placing Civil Action No. 03-3155 in suspense pending disposition of this action.

II. LEGAL STANDARD

When determining a motion to dismiss pursuant to Rule

⁵ This count is identical to Count XI.

⁶ It appears that, with the exception of Counts V and VI, all of the Counts in the Amended Cross-Claim are asserted against each of the Smithfield Defendants. Nevertheless, the allegations of the Amended Cross-Claim relate almost exclusively to the conduct of Smithfield alone. Accordingly, except where otherwise noted, the Court will hereinafter refer only to Smithfield in discussing the alleged conduct underlying Pennexx's claims for relief.

12(b)(6), the court must accept as true all well pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted when a plaintiff cannot prove any set of facts, consistent with the complaint, which would entitle him or her to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). Documents "integral to or explicitly relied upon in the complaint" and related matters of public record may be considered on a motion to dismiss. In re Burlington Coat Factory, 114 F.3d at 1426 (emphasis omitted).

III. DISCUSSION

The Smithfield Defendants argue that Counts III, IV, X, XI, and XIII of the Amended Cross-Claim should be dismissed because Pennexx cannot prove any set of facts, consistent with the Amended Cross-Claim, which would entitle it to relief on these claims. The Smithfield Defendants seek dismissal of the remaining nine counts of the Amended Cross-Claim as being barred under the terms of the general release contained in Forbearance Agreement.⁷

⁷ Release is an affirmative defense, see Fed. R. Civ. P. 8(c), and is generally asserted by motion for judgment on the pleadings or summary judgment. In this case, however, Pennexx has explicitly relied on the Forbearance Agreement (and the general release contained therein) in its Amended Cross-Claim, and both parties have attached the Forbearance Agreement as an exhibit in connection with the instant Motion. (See Pennexx Ex. C; Smithfield Defs. Ex. 1.) Accordingly, the Court may properly consider the terms of the Forbearance Agreement, including the general release contained

A. Non-Released Claims

1. Fraud in the inducement

The Smithfield Defendants move to dismiss Count III of the Amended Cross-Claim, in which Pennexx alleges that Smithfield fraudulently induced the company to enter into the Forbearance Agreement. Under Pennsylvania law,⁸ a claim for fraud in the inducement consists of the following elements: (1) a material misrepresentation of fact; (2) the maker was aware of its falsity or reckless as to whether it was true or false; (3) the statement was made or omitted with the intent of misleading or inducing the plaintiff to rely on it; (4) justifiable reliance by the plaintiff on the misrepresentation; (5) damages to the plaintiff as a

therein, in ruling on the instant Motion. See Cuchara v. Gai-Tronics Corp., Civ. A. No. 03-6573, 2004 WL 1438186, at *4-*5 (E.D. Pa. Apr. 7, 2004) (considering agreement and general release on 12(b)(6) motion where "Plaintiff's allegations, as set forth in the Complaint, are heavily based on the Agreement and General Release [and] the Agreement is attached as an exhibit to both Plaintiff's and Defendants' supporting Memoranda"); see also Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 897 (3d Cir. 1975) (reversing district court's denial of motion to dismiss based on release defense).

⁸ The Forbearance Agreement includes the following choice of law provision: "This Agreement shall be governed by and construed and interpreted in accordance with the laws of the Commonwealth of Virginia, notwithstanding its conflict of laws principles or any other rule, regulation or principle that would result in the application of any other state's law." (Forbearance Agreement ¶ 17.) The Smithfield Defendants are not seeking to enforce the Forbearance Agreement's choice of law provision in this case, as the parties have agreed that Pennsylvania law should govern the state law claims asserted in the Amended Cross-Claim, including claims which arise from the Forbearance Agreement. (See 02/04/05 Tr. at 14; see also Smithfield Defs.' Reply at 2 n.1).

proximate result of reliance on the misrepresentation; and (6) the misrepresentation was made with the specific intent to induce another to enter into a contract when the person had no duty to do so. McAllister v. Royal Caribbean Cruises, Ltd., Civ. A. No. 02-2393, 2003 WL 23192102, at *5 (E.D. Pa. Sept. 30, 2003) (citations omitted).

The Smithfield Defendants argue that Pennexx's fraud in the inducement claim is barred under Pennsylvania's parol evidence rule. The parol evidence rule provides that "[w]here the parties to an agreement adopt a writing as the final and complete expression of their agreement, . . . evidence of negotiations leading to the formation of the agreement is inadmissible to show an intent at variance with the language of the written agreement." Goldstein v. Murland, Civ. A. No. 02-247, 2002 WL 1371747, at *2 (E.D. Pa. June 24, 2002) (quoting 1726 Cherry St. P'ship v. Bell Atlantic Props., Inc., 653 A.2d 663, 665 (Pa. Super. Ct. 1995)). The Smithfield Defendants note that the Forbearance Agreement contains an integration clause which expressly provides that "[t]his Agreement constitutes the entire agreement of the parties hereto with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings relating to the subject matter hereof." (Forbearance Agreement ¶ 20.) Pennexx and Smithfield also each expressly represented that, in entering into the Forbearance Agreement, neither party "relied upon any

representation, warranty, covenant or agreement not expressly set forth herein." (Id. ¶ 11(e).)

Courts have routinely held that "Pennsylvania law prohibits recovery on a claim of fraud in the inducement where the contract represents a fully integrated written agreement." Goldstein, 2002 WL 1371747, at *2 (citing North Am. Roofing & Sheet Metal Co., Inc. v. Bldg. & Constr. Trades Council of Phila. & Vicinity, Civ. A. No. 99-2050, 2000 WL 230214, at *7 (E.D. Pa. Feb. 29, 2000)). Pennexx does not dispute that the Forbearance Agreement constitutes a fully integrated contract. (Pennexx Resp. at 18 n.17.) Pennexx instead argues that the parol evidence rule does not bar its fraudulent inducement claim because Smithfield made misrepresentations of present intent that are contained in the express terms of the Forbearance Agreement. The Amended Cross-Claim alleges that "Smithfield misrepresented *in the Forbearance Agreement* with Pennexx that: (1) it would not take any action to prevent or make more difficult the redomestication and recapitalization of Pennexx, and (2) it would execute and deliver all such other instruments and take all such other action as either party may reasonably request from time to time in order to effectuate the recapitalization of Pennexx." (Am. Cross-Cl. ¶ 378) (emphasis added).⁹ As discussed

⁹ The Amended Cross-Claim also alleges that "[p]rior to entering the Forbearance Agreement, Smithfield misrepresented to Pennexx that events of default had occurred under the Credit Agreement between Smithfield and Pennexx." (Id. ¶ 383.) (emphasis added). Pennexx's reliance on this alleged misrepresentation is

below, however, neither of the alleged misrepresentations concerning the redomestication and recapitalization of Pennexx were incorporated by the parties into the Forbearance Agreement as express contractual duties. Even if the alleged misrepresentations on which Pennexx relies had been incorporated into the Forbearance Agreement, it is well settled under Pennsylvania law that the tort of fraudulent inducement embraces only "oral representations on which the other party relied in entering into the agreement but which are contrary to the express terms of the agreement." Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1300 (3d Cir. 1996).¹⁰ As the parol evidence rule bars Pennexx from offering evidence of any oral representations made by the Smithfield Defendants that are contrary to the express terms of the fully integrated Forbearance Agreement, Pennexx's fraudulent inducement claim must fail. Accordingly, the Smithfield Defendants' Motion is granted with respect to Count III of the Amended Cross-Claim.

2. Breach of contract

The Smithfield Defendants also move to dismiss Pennexx's breach of contract claim in Count X of the Amended Cross-Claim for

foreclosed by the parol evidence rule.

¹⁰ The Court also notes that Pennexx relies on the same alleged misrepresentations in support of its breach of contract claim in Count X. Under Pennsylvania law, "[t]he 'gist of the action' doctrine bars a contracting party from pursuing a tort claim against the other party where the essential nature of the claim is contractual." Owen J. Roberts Sch. Dist. v. HTE, Inc., Civ. A. No. 02-7830, 2003 WL 735098, at *2 (E.D. Pa. Feb. 28, 2003).

failure to state a claim upon which relief can be granted. The Amended Cross-Claim alleges that the Smithfield Defendants breached the Forbearance Agreement¹¹ by taking actions that impeded the redomestication and recapitalization of Pennexx. Specifically, the Amended Cross-Claim alleges that, in late May 2003, Pennexx began looking for a new joint venture partner to replace Smithfield, which had refused to continue funding Pennexx. (Am. Cross-Cl. ¶ 312.) Potential investors were reluctant to enter into a joint

¹¹ The Amended Cross-Claim presupposes that an ordinary breach of contract claim for damages may be brought where, as here, the contract at issue has been judicially approved and incorporated into a consent decree. Although "a consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature[,] . . . it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree." Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992). Thus, whereas the only penalty for violation of a private agreement is "another suit [for breach of contract]," violation of a consent decree "may be enforced by judicial sanctions, including citation for contempt." United States v. City of Miami, 664 F.2d 435, 439-440 (Former 5th Cir. Dec. 1981) (en banc). It is unclear whether an aggrieved party retains the option of asserting an ordinary breach of contract claim where the agreement upon which the claim is based has been incorporated into a consent decree. At least one court has held that the an injured party's "only recourse to remedy violations of [a] Consent Decree [is] to seek a contempt citation . . .[,] not to file a whole new claim based on a contract theory." United Black Firefighters Assoc. v. City of Akron, Civ. A. No. 90-1678, 1994 WL 774510, at *17 (N.D. Ohio Aug. 31, 1994). Other courts have concluded that the incorporation of a private agreement into a consent decree does not necessarily prohibit the aggrieved party from asserting an ordinary breach of contract action for damages. See Project Mgmt. Inst., Inc. v. Ireland, Civ. A. No. 03-1712, 2003 WL 23162399, at *2 (E.D. Pa. Dec. 30, 2003) (suggesting that party may seek enforcement of consent decree by asserting civil contempt claim or breach of contract claim). For the sake of argument, the Court assumes that an ordinary breach of contract claim may be properly asserted where the contract at issue has been incorporated into a consent decree.

venture with Pennexx because, under the Pennsylvania Anti-Hostile Takeover law, any new investor would be limited to 20% voting rights, while Smithfield would be entitled to vote its entire 40.1% share¹² of Pennexx stock. (Id. ¶¶ 313-14.) To avoid the constraints of the Anti-Hostile Takeover law, Pennexx could either unregister the company or redomesticate the company in Delaware. (Id. ¶ 315.) Pennexx and Smithfield thereafter entered into the Forbearance Agreement, which imposed the following pertinent duties and obligations on Smithfield:

13. **Smithfield Voting and Corporate Covenants.**
Provided that no Default has occurred hereunder, Smithfield shall and hereby agrees to:

- (b) (i) Be present in person or by proxy at a meeting of the shareholders of PENNEXX (the "Meeting") (so that all shares of PENNEXX common stock beneficially owned by Smithfield may be counted for the purposes of determining the presence of a quorum at the Meeting) called on or after June 18, 2003 for the purpose of voting on, and (ii) vote all of its shares of PENNEXX common stock at the Meeting in favor of, a proposal to merge PENNEXX with and into a to-be-formed, wholly-owned Delaware subsidiary of Pennexx for the purposes of redomestication and to facilitate the recapitalization of PENNEXX by increasing the number of authorized shares of capital stock (the "Delaware Merger"), or if so requested by PENNEXX, to execute a consent in writing to effect a consent to and adoption and approval of the Delaware Merger.

¹² Smithfield's 50% stake in Pennexx was reduced to approximately 40% after Pennexx sold 2.85 million shares of common stock as part of a \$5 million private placement in February 2003. (Am. Cross-Cl. ¶ 224.)

- (c) Refrain, directly or indirectly, from soliciting proxies with respect to the common stock of PENNEXX or becoming a "participant" in a "solicitation" (as such terms are defined in Regulations 14A promulgated under the Securities Exchange Act of 1934) in opposition to the recommendation of the Board of Directors of PENNEXX with respect to the proposal for the Delaware Merger;
- (d) Not sell or transfer any shares of its PENNEXX common stock or exercise any demand registration right under the certain Registration Rights Agreement between Smithfield and PENNEXX dated June 27, 2001 for a period of at least one hundred twenty (120) days;
- (e) Not take any action to prevent or make more difficult the passage of the proposal for the Delaware Merger.

(Forbearance Agreement ¶ 13.) In May/June 2003, Pennexx and Swift & Company ("Swift") began negotiating over a potential joint venture. (Am. Cross-Cl. ¶ 325.) Swift expressed concern that the Forbearance Agreement was not in conformance with standard corporate governance procedures and that, as a result, Smithfield could withhold its proxy to redomesticate the company in Delaware and increase the number of authorized shares of Pennexx capital stock. (Id. ¶ 332.) To ensure that Smithfield could not continue to exercise control over Pennexx under the Pennsylvania Anti-Hostile Takeover law, Swift wanted Smithfield to sell its 40.1% stake in Pennexx stock. (Id. ¶ 333.) Smithfield advised Pennexx that it was unwilling to sell its Penenxx stock to Swift, which resulted in the collapse of the negotiations between Swift and

Pennexx. (Id. ¶ 335.) By refusing to sell its Pennexx stock to Swift, Pennexx asserts that Smithfield breached its obligation under the Forbearance Agreement to refrain from taking any action that impedes the redomestication and recapitalization of Pennexx.

Smithfield argues that it was not required under the Forbearance Agreement to refrain from taking any action that could conceivably impede the redomestication and recapitalization of Pennexx. Smithfield maintains that its obligations under the Forbearance Agreement were strictly limited to *passage of the proposal* for the Delaware Merger. Thus, Smithfield contends that the provision in the Forbearance Agreement which required the company to “[n]ot take any action to prevent or make more difficult the passage of the proposal for the Delaware Merger” did not affirmatively obligate Smithfield to sell its Pennexx common stock. Indeed, the Smithfield Defendants note that the Forbearance Agreement includes a provision that prohibited Smithfield from selling or transferring its Pennexx common stock for 120 days after the signing of the Forbearance Agreement.

In response, Pennexx contends that the Forbearance Agreement is ambiguous concerning the scope of Smithfield’s obligations to facilitate the redomestication and recapitalization of Pennexx. Pennexx maintains that the circumstances leading up to the entry of the Forbearance Agreement show that the purpose of the Forbearance Agreement was to recapitalize Pennexx by replacing Smithfield with

another entity as Pennexx's joint venture partner. Pennexx contends that, notwithstanding contractual language to the contrary, Smithfield was obligated to sell its Pennexx stock to Swift to effectuate the purpose of the Forbearance Agreement. Pennexx has attached to its response brief the Declaration of Michael Queen, the company's former President and Chief Executive Officer, and the Declaration of Steven King, Esquire, one of the company's attorneys, in support of its view of the general ramifications of the Forbearance Agreement.

The goal of contract interpretation is to ascertain the parties' objective mutual intent. Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 613 (3d Cir. 1995). Under Pennsylvania law, "[i]t is firmly settled that the intent of the parties to the written contract is contained in the writing itself." Id. (quoting Samuel Rappaport Family P'ship v. Meridian Bank, 657 A.2d 17, 21 (Pa. 1995)). Where the language of the contract is clear and unambiguous, "the focus of interpretation is upon the terms of the agreement as *manifestly expressed*, rather than as, perhaps, silently intended," Steuart v. McChesney, 444 A.2d 659, 866 (Pa. 1982), and "there is no need to resort to extrinsic aids or evidence." Id. (quoting East Crossroads Ctr., Inc. v. Mellon-Stuart Co., 205 A.2d 865, 866 (Pa. 1965)). Because Pennsylvania law presumes that the written contract conveys the parties' intent, the writing

will be found ambiguous if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree on the proper construction.

Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 93 (3d Cir. 2001) (quoting Duquense Light, 66 F.3d at 614). The determination of whether a contract is ambiguous is a question of law for the court, Sanford Inv. Co., Inc. v. Ahlstrom Mach. Holdings, Inc., 198 F.3d 415, 421 (3d Cir. 1999), "and there is no reason why a court cannot decide such an issue [o]n a motion to dismiss." Chemtech Int'l, Inc. v. Chem. Injection Techs., Inc., Civ. A. No. 05-140, 2005 WL 839404, at *2 (E.D. Pa. Apr. 12, 2005) (citations omitted).

Pennexx's contention that the Forbearance Agreement broadly requires Smithfield to refrain from taking any action that could impede the redomestication and recapitalization of Pennexx, including refusing to sell its Pennexx stock, finds no support in the plain language of the Forbearance Agreement. The clear intent of the parties, as expressed by the unambiguous language of the Forbearance Agreement, was for Smithfield to merely facilitate the passage of the Delaware Merger proposal at a special meeting of

Pennexx shareholders to be held on or after June 18, 2003. The Delaware Merger proposal, as defined in the Forbearance Agreement, included two components: (1) merging Pennexx with and into a to-be-formed, wholly-owned Delaware subsidiary of Pennexx "for the purposes of redomestication"; and (2) increasing the number of authorized shares of Pennexx capital stock "to facilitate the recapitalization" of Pennexx. (Forbearance Agreement ¶ 13(b).) To the extent that the Forbearance Agreement obligated Smithfield to assist in the redomestication and recapitalization of Pennexx, that obligation was strictly limited to approving a proposal to merge Pennexx into a Delaware shell corporation and to increase the number of authorized shares of Pennexx capital stock. Indeed, even the scope of the catch-all provision in paragraph 13(e) of the Forbearance Agreement is narrowly confined to any action by Smithfield that would "prevent or make more difficult the *passage of the proposal* for the Delaware Merger." (Forbearance Agreement ¶ 13(e)) (emphasis added).¹³ Thus, regardless of whether selling

¹³ The Court also concludes that the "Further Assurances" Clause in the Forbearance Agreement, which provides in part that "PENNEXX and Smithfield agree to execute and deliver all such other instruments and take all such other action as either party may reasonably request from time to time, without payment of further consideration, in order to effectuate the transactions provided for herein" (Forbearance Agreement ¶ 15), does not alter or expand the substantive scope of the parties' duties and obligations under the Forbearance Agreement. Indeed, interpreting the Further Assurances Clause as requiring Smithfield to sell its 40.1% stake in Pennexx "without payment of further consideration" would lead to an absurd result.

its Pennexx stock would have facilitated the redomestication and recapitalization of Pennexx, the Forbearance Agreement did not obligate Smithfield to sell its Pennexx stock to Swift in June 2003. To the contrary, the Forbearance Agreement expressly prohibited, without qualification, Smithfield's ability to "sell or transfer any of shares of its PENNEXX common stock for one hundred twenty (120) days" after the entry of the Forbearance Agreement. (Forbearance Agreement ¶ 13(d).) Pennexx's competing interpretation is not based on the language of the Forbearance Agreement itself, but on its own understanding of the contract's import from the circumstances surrounding the transaction. It is beyond cavil that parol evidence is not admissible to inject ambiguity into an otherwise unambiguous, fully integrated contract. Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1010 n.9 (3d Cir. 1980).¹⁴ The Court, therefore, declines Pennexx's invitation to engraft onto the Forbearance Agreement a generalized

¹⁴ Pennsylvania law does permit a court to consider certain forms of extrinsic evidence where "a latent ambiguity arises from extraneous or collateral facts which make the meaning of a written agreement uncertain although the language thereof, on its face, appears clear and unambiguous." Bohler-Uddeholm, 247 F.3d at 93 (citation omitted). To the extent that Pennexx relies on the Queen and King Declarations to prove latent ambiguity in the Forbearance Agreement, it is well-settled that evidence "regarding a party's beliefs about the general ramifications of a contract [is] not . . . the right type [of evidence] to establish latent ambiguity." Id. at 94 n.3. Accordingly, the Court has not considered the Queen and King Affidavits in ruling on the instant Motion. See Fed. R. Civ. P. 12(b)(6) (noting that court may exclude matters outside the pleadings).

obligation requiring Smithfield to refrain from taking any action which could impede the redomestication and recapitalization of Pennexx. As the Amended Cross-Claim is devoid of allegations from which the Court can reasonably infer that Smithfield breached any of its discrete duties relating to the passage of the Delaware Merger proposal,¹⁵ Pennexx's claim for breach of the Forbearance Agreement must fail. Accordingly, the Smithfield Defendants' Motion to Dismiss Count X of the Amended Cross-Claim is granted.

3. Fraud on the court

The Smithfield Defendants move to dismiss Pennexx's fraud on the court claim in Count IV of the Amended Cross-Claim. The Amended Cross-Claim alleges that, in presenting the Forbearance Agreement to the Court for approval in Civil Action No. 03-3155, Smithfield misrepresented to the Court, through the Forbearance Agreement, that: (1) it would not take any action to prevent or make more difficult the redomestication and recapitalization of Pennexx, and (2) it would execute and deliver all such other instruments and take all such other action as either party may

¹⁵ Although Pennexx has principally relied on the Amended Cross-Claim's allegations concerning Smithfield's refusal to sell its Pennexx stock to Swift in opposing the instant Motion, it appears the Amended Cross-Claim also alleges that Smithfield breached the Forbearance Agreement by (1) shorting Pennexx on meat invoices; (2) charging Pennexx more per pound of beef than it charged other customers; and (3) offering to provide case-ready meats to Pathmark, Pennexx's largest customer, at lower prices. (Am. Cross-Cl. ¶¶ 322-324.) This alleged misconduct does not implicate Smithfield's limited obligations under the Forbearance Agreement.

reasonably request from time to time in order to effectuate the recapitalization of Pennexx. (Am. Cross-Cl. ¶ 394.) As a direct and proximate result of Smithfield's misrepresentations to Pennexx and the Court, Pennexx suffered damages, including the loss of its shareholders' equity and the future value of Pennexx as a company. (Id. ¶ 404.) Pennexx requests that the Court vacate the Stipulated Order entered in Civil Action No. 03-3155.

Federal courts enjoy the inherent power to set aside a judgment for fraud upon the court. Averbach v. Rival Mfg. Co., 809 F.2d 1016, 1021 (3d Cir. 1987); see also Fed. R. Civ. P. 60(b) ("This rule does not limit the power of a court . . . to set aside a judgment for fraud upon the court."). The concept of fraud on the court is very narrowly construed by federal courts. Great Coastal Express, Inc. v. Int'l Brotherhood of Teamsters, 675 F.3d 1349, 1356 (4th Cir. 1982). As this Court has stated:

Fraud upon the court does not encompass every type of fraud which may arise in connection with a case but rather is limited to that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.

Courts have found fraud upon the court only where there has been the most egregious conduct involving a corruption of the judicial process itself. Examples of such conduct are bribery of judges, employment of counsel to influence the court, bribery of the jury, and involvement of an attorney (an officer of the

court) in the perpetration of fraud.

United States v. Zinner, Crim. A. No. 94-0048, 1998 WL 57522, at *3 (E.D. Pa. Feb. 9, 1998) (citations and internal quotation omitted). The Amended Cross-Claim merely alleges that Smithfield misrepresented to the Court that it would comply with the terms and conditions of the Forbearance Agreement, which resulted in injury to Pennexx. Accepting these allegations as true and drawing all reasonable inferences therefrom in favor of Pennexx, the Court cannot conclude that Count IV of the Amended Cross-Claim supports a claim that the Smithfield Defendants engaged in a scheme to fraudulently subvert the integrity of the judicial process which resulted in "far more than an injury to a single litigant." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245-46 (1944).¹⁶ Accordingly, the Smithfield Defendants' Motion to Dismiss

¹⁶ In its Response to the instant Motion, Pennexx argues that Smithfield has continued to perpetrate a fraud upon the court by making misrepresentations concerning the value of Pennexx's assets at the time of foreclosure. Pennexx has appended two exhibits to its Response in support of these additional misrepresentations. (Pennexx Resp. Ex. D, E.) The Amended Cross-Claim does not, however, include any allegations relating to the misrepresentations on which Pennexx now attempts to rely. The Court, therefore, declines to consider Pennexx's additional "allegations" of fraud upon the court in ruling on the instant Motion. See Fed. R. 12(b)(6) (noting that court may exclude matters outside the pleadings); Fed. R. Civ. P. 15(a) (noting that party must obtain leave of court or written consent from opposing party to amend pleading after party has already amended pleading once as a matter of course). Even if the Court could properly consider Pennexx's additional "allegations" of fraud upon the court in ruling on the instant Motion, Count IV would still fail to state a claim upon which relief can be granted.

Count IV of the Amended Cross-Claim is granted.

4. Breach of good faith and fair dealing

The Smithfield Defendants also move to dismiss Counts XI and XIII of the Amended Cross-Claim, in which Pennexx alleges that Smithfield breached its duty of good faith and fair dealing in carrying out its obligations under the Forbearance Agreement. Pennexx's breach of good faith and fair dealing claim is premised on the same conduct that forms the basis of its breach of contract claim in Count X. The Smithfield Defendants cite ample support for the proposition that Pennsylvania law does not recognize a cause of action for breach of good faith and fair dealing separate and apart from a breach of contract claim. See, e.g., Bagasra v. Thomas Jefferson Univ., Civ. A. No. 99-2321, 1999 WL 517404, at *1 (E.D. Pa. July 20, 1999); Drysdale v. Woerth, Civ. A. No. 98-3090, 1998 WL 966020, at *3 (E.D. Pa. Nov. 18, 1998); EEOC v. Pathmark, Inc., Civ. A. No. 97-3994, 1998 WL 57520, at *6 (E.D. Pa. Feb. 12, 1998). As Pennexx's breach of good faith and fair dealing claims in Counts XI and XIII are based on the same allegations as its inactionable breach of contract claim in Count X, it would be futile to recast Counts XI and XIII as claims for breach of contract. Accordingly, the Smithfield Defendants' Motion is granted with respect to Counts XI and XIII of the Amended Cross-Claim.¹⁷

¹⁷ Pennexx has advised the Court that it inadvertently mispleaded Count XIII as a claim for breach of good faith and fair dealing with respect to the Forbearance Agreement. Pennexx seeks leave to

B. General Release

The Smithfield Defendants contend that Pennexx's remaining claims (Counts I, II, V, VI, VII, VIII, IX, XII, and XIV) are barred by the general release contained in the Forbearance Agreement because these claims are related to events occurring prior to May 30, 2003, the date on which the Forbearance Agreement was entered as a Stipulated Order, or were raised by Pennexx in the replevin action.

Under Pennsylvania law, a signed release is binding on the parties unless procured and executed by "fraud, duress, or other circumstances sufficient to invalidate the agreement." Wastak v. Lehigh Valley Health Network, 342 F.3d 281, 295 (3d Cir. 2003). Nowhere in its submissions does Pennexx dispute that Counts I, II, V, VI, VII, VIII, IX, XII, and XIV fall within the broad scope of the general release. Instead, Pennexx argues only that the general release is unenforceable because Smithfield fraudulently induced Pennexx to enter into the Forbearance Agreement, perpetrated a

replead Count XIII as a claim for breach of good faith and fair dealing with respect to the Credit and Stock Purchase Agreements. Because Pennsylvania does not recognize an independent cause of action for breach of the duty of good faith and fair dealing, and because any such claim related to the Credit and Stock Purchase Agreements would be barred by the general release, as discussed *infra*, granting Pennexx leave to replead Count XIII would be futile. See Shane v. Fauver, 213 F.3d 113, 115-117 (3d Cir. 2000) (denial without leave to amend is justified on grounds of futility, i.e., the amended claim would fail to state a claim upon which relief could be granted). Accordingly, Pennexx's request for leave to replead Count XIII is denied.

fraud in presenting the Forbearance Agreement to the Court for approval in Civil Action No. 03-3155, and materially breached the Forbearance Agreement by refusing to sell its Pennexx stock. The Court, however, has already rejected these arguments in dismissing Counts III, IV, and X of the Amended Cross-Claim for failure to state claims upon which relief can be granted.¹⁸ The Court concludes, therefore, that Counts I, II, V, VI, VII, VIII, IX, XII, and XIV are barred by the general release contained in the Forbearance Agreement.¹⁹ Accordingly, the Smithfield Defendants' Motion is granted with respect to Counts I, II, V, VI, VII, VIII, IX, XII, and XIV of the Amended Cross-Claim.²⁰

¹⁸ The Court further notes that "[w]hen a contract is induced by fraud, . . . the injured party has a choice of alternate remedies: he may either rescind the contract or affirm it and maintain an action in deceit for damages." Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Invs., 951 F.2d 1399, 1408 (3d Cir. 1991) (emphasis added) (citations omitted). In seeking damages in connection with its claim for fraudulent inducement in Count III, Pennexx elected to affirm the Forbearance Agreement and the general release contained therein. As the legal remedy of damages and the equitable remedy of rescission are inconsistent and mutually exclusive, Pennexx thereby waived any claim for rescission of the Forbearance Agreement on the basis of fraudulent inducement. See Allied Erecting & Dismantling Co. v. USX Corp., 249 F.3d 191, 199 (3d Cir. 2001) (noting that affirmance of contract bars rescission).

¹⁹ The Court expresses no opinion as to whether Pennexx's shareholders are subject to the general release in the Forbearance Agreement.

²⁰ Because the Court has concluded that all fourteen counts of the Amended Cross-Claim are either barred by the general release or fail to state claims upon which relief can be granted, the Court need not consider whether the Amended Cross-Claim constitutes an impermissible collateral attack on the Stipulated Order entered in

IV. CONCLUSION

For the foregoing reasons, the Smithfield Defendants' Motion

Civil Action 03-3155 under the doctrine of res judicata. See Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29, 32 (1st Cir. 1991) ("It is beyond cavil that a suit can be barred by the earlier settlement of another suit in either of two ways: res judicata or release Since further prosecution of appellants' federal suit is foreclosed by the release defense . . . , it would be pointless to discuss at any length whether their action is also claim-precluded.").

The Court also declines Pennexx's request, which it first made in a brief filed over one year after the filing of the Amended Cross-Claim, to recharacterize its state law claims for damages as a direct attack on the Stipulated Order pursuant to Rule 60(b). As Judge Easterbrook wrote in rejecting a *pro se* litigant's request to treat his complaint as a Rule 60(b) motion:

Complaints state *claims*, while motions under Rule 60(b) state *reasons for modification*. The document that Gleash filed was a claim, not a request (with reasons) for alteration Just as a letter is not a complaint, so a complaint is not a motion in a prior and unnamed case. The civil rules distinguish 'pleadings' from motions, and this was a 'pleading.' That much of form must be respected, given the many rules (including timing and answer requirements) for pleadings, which differ substantially from the timing and form rules for motions. Otherwise litigation is chaos.

Gleash v. Yuswak, 308 F.3d 758, 761 (7th Cir. 2002) (internal citation omitted); see also Hendrick v. Avent, 891 F.2d 583, 588-89 (5th Cir. 1990) ("The law and policy surrounding a Rule 60(b) motion is clear that this motion was intended to be the only method of attacking a final judgment and not to be used in abundance. Consequently, a judicial recharacterization of a lawsuit to fit this mold would be rare indeed. Clearly, making appellant's claim fit under the label of a Rule 60(b) motion would take a recharacterization of the pleadings *plus* a relation back in time to the original complaint to fit within the time constraints. The district court properly refused to perform such feats."); accord Engleson v. Burlington N. R.R. Co., 972 F.2d 1038, 1043 (9th Cir. 1992).

to Dismiss the Amended Cross-Claim filed by Pennexx is granted in its entirety.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEAN FITZPATRICK	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
MICHAEL QUEEN, et al.	:	NO. 03-4318

O R D E R

AND NOW, this 16th day of May, 2005, upon consideration of the Smithfield Defendants' Motion to Dismiss the Amended Cross-Claim of Pennexx Foods, Inc. (Doc. No. 88), Pennexx's Response thereto, the oral argument held before the Court on February 4, 2005, and all attendant and responsive briefing, **IT IS HEREBY ORDERED** that said Motion is **GRANTED**. The Amended Cross-Claim (Doc. No. 43) is **DISMISSED** in its entirety.

BY THE COURT:

s/ John R. Padova
John R. Padova, J.